United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7554

United States Court of Appeals For the Second Circuit

ELSIE M. HAVANICH,

Appellant,

vs.

SAFECO INSURANCE COMPANY OF AMERICA,

Appellee.

On Appeal From The United States District Court For The District Of Connecticut At Waterbury

APPELLANT'S BRIEF

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INTRODUCTION

This is a diversity action brought by the Administratrix of the insured's estate against the family's automobile insurance carrier claiming coverage and damages under the uninsured motorists provisions of the policy.

The District Court, (Murphy, J.), following the close of evidence in a jury trial directed a verdict in favor of the defendant.

ISSUES PRESENTED:

1. Did the Court err in directing the verdict?
2. Did the Court afford the plaintiff a full and fair hearing on the motion for directed verdict?

STATEMENT OF THE CASE:

The plaintiff ELSIE HAVANICH, ADMINISTRATRIX OF THE ESTATE OF CAROL HAVANICH brought this action by complaint alleging that her daughter was insured under an automobile insurance policy issued by the defendant SAFECO INSURANCE COMPANY OF AMERICA to Louis J. Havanich, which policy provided $20,000 uninsured motorists coverage, and alleging that the plaintiff's daughter died as a result of the negligence of a Massachusetts driver operating his Massachusetts vehicle which had only $5,000 liability insurance coverage, the minimum provided by the laws of Massachusetts. The defendant SAFECO denied coverage and subsequently

refused to pay. The plaintiff seeks a declaratory judgment, an order for arbitration, or damages. The defendant filed an answer denying the allegations, and pleading by way of special defense that the plaintiff breached the policy and voided coverage by settling with the uninsured motorist for $5,000 (the policy limits on the Massachusetts insurance covering the uninsured motorist).

STATEMENT OF FACTS:

Carol Ann Havanich was the nineteen-year-old daughter of ELSIE HAVANICH and Louis J. Havanich. Carol Ann was a student at Dean Junior College at Franklin, Massachusetts. The HAVANICHS' two automobiles were insured by the defendant SAFECO INSURANCE COMPANY OF AMERICA under an automobile insurance policy which contains (as is required in Connecticut) $20,000 uninsured motorists coverage (Exhibit 3).

On February 19, 1971 Carol Ann Havanich was killed in a one-car accident. She was a passenger in a vehicle owned and operated by Joseph Decesare of Franklin, Massachusetts. (Ex. 4, app.p. 23a). Decesare had only the minimum Massachusetts insurance policy with liability limits of $5,000 per person. (Ex. 4, app. p. 23a).

Following his retention by the parents of Carol Ann Havanich, Attorney Miller sent an investigator to Massachusetts who reported back to him on the facts of the accident, including information that the driver

responsible for the accident Mr. Decesare, had only $5,000 insurance coverage. (app. p. 40a). Immediately thereafter on February 25, 1971 Attorney Miller called the Fairfield Claim Office of SAFECO INSURANCE COMPANY and spoke with Mr. Brownie Blazak, the claims supervisor. (app. p. 41a). Miller informed Blazak that there was only the $5,000 liability insurance, and inquired about the uninsured motorists coverage. (app. p. 42a, 73a). Blazak stated to Miller firmly and emphatically that SAFECO'S position in a situation of that nature was that since the vehicle was in fact insured with limits ($5,000) which met the minimum requirements of Massachusetts where the accident occurred, that the SAFECO uninsured motorists coverage did not apply, even though the minimum limits of SAFECO coverage were $20,000. (app. p. 42a, 64a-65a, 72a). In this conversation Miller let Blazak know that he was intending to collect the $5,000 from the insurance carrier for the driver of the death car, and would look to SAFECO for the remaining $15,000. (app. p. 41a).

Blazak's denial of coverage was clear and unequivocal. (app. p. 44a, 64a-65a).

Thereafter Miller forwarded his letter of March 2, 1971 to Blazak (Ex. 4, app. p. 23a) referring to their telephone conversation, advising that there was only $5,000 liability coverage, and asking for the medical payments to be made.

On March 9th, Joseph J. Santillo, a SAFECO adjuster at the Fairfield Office, wrote to Attorney Miller asking for the medical payments, bills, and asking for an affidavit or proof on the existing insurance coverage on the Decesare automobile. (Ex. 6, app. p. 25a). At the same time, a SAFECO memorandum dated March 10th (Ex. 26) indicates:

> "Decesare auto apparently insured. Request attorney to get affidavit of such insurance."
>
> (Ex. 26, app. p. 34a)

Thereafter Miller obtained a letter from the Massachusetts attorney (Ex. 8, app. p. 26a) certifying that Firemen's Fund policy #AR1-8237009 was in force covering the Decesare vehicle with limits of $5,000/10,000. Miller forwarded a copy of this letter to adjuster Santillo on March 25, 1971 along with his letter of March 25th, (Ex. 9, app. p. 27a) indicating that the liability coverage from the Decesare vehicle was $5,000/10,000 as per the enclosed letter from the Massachusetts attorney. Miller again requested payment of the $2,000 medical payments.

SAFECO thereupon issued its draft in the amount of $2,000, approved by claims supervisor, Blazak, and the SAFECO file was closed with Mr. Santillo's memorandum of April 7, 1971 which states:

> "Received copy of letter of Mass. Atty. re: limit of coverage. Proof received from estate for limit of $2,000. Issued draft in that amount. CA-210 attached. File closed."
>
> (Ex. 27, app. p. 35a).

Miller thereupon went after Firemen's Fund, carrier for Joseph Decesare, and proceeded to collect from Firemen's Fund the full $5,000 policy limits, giving a release to Joseph Decesare in return for the $5,000. "Friendly" suit papers were filed in Massachusetts in accordance with the Massachusetts procedure. (Ex. 10, app. p. 28a).

Miller thereupon turned to collect the balance from SAFECO. He contacted the Insurance Commissioner of the State of Connecticut by letter of July 15th, and also contacted SAFECO that he had collected $5,000 from Firemen's Fund, and he also made express reference to the earlier denial of coverage by SAFECO. (Ex. 12, app. p. 30a).

Miller received a telephone call on July 29th from James Ostrowski new claims manager for SAFECO at the Fairfield Office, in which Ostrowski reiterated the denial of coverage based on the $5,000 Massachusetts policy "A la Blazak". (app. p. 84a-85a, 91a). This was followed by Santillo's letter of August 3, 1971 to Miller further denying coverage. (Ex. 14, app. p. 31a).

On July 29, 1971, John Fellers, Eastern Division claims manager for SAFECO had written to the Fairfield Office setting out in some detail SAFECO'S position, namely that because there was $5,000 coverage in Massachusetts the Decesare vehicle was not an "uninsured motor vehicle" and therefore the uninsured motorists coverage in the SAFECO policy did not apply. (Ex. 28, app. p. 36a).

Following the intervention by the Insurance Department of the State of Connecticut and a "request" contained in their letter of September 7, 1971, SAFECO reversed its position and wrote to the Insurance Commissioner on September 13, 1971 confirming they were providing coverage for the loss. (Ex. 22, app. p. 32a).

At some point later in 1971 or early 1972, SAFECO again reversed itself, this time denying coverage because the HAVANICH estate had settled with Firemen's Fund and issued a release in favor of the uninsured motorist, which, according to SAFECO, "voided any coverage we had under our policy". (Ex. 24, app. p. 33a). However SAFECO had at the outset denied coverage (Blazak February 25, 1971). (app. p. 42a).

Following SAFECO'S initial unequivocal denial of coverage, Miller went after the available $5,000 from Firemen's Fund before proceeding against SAFECO because:

1. In his experience with insurance companies, once they take a position on coverage, they do not change their minds, and he felt that no matter what he said, he would not be able to convince SAFECO to pay voluntarily.

2. He felt that the courts would have to decide this question of coverage.

3. It could take a long time for the court determination of coverage (indeed the instant litigation has consumed three and one-half years from filing of complaint to trial). (app. p. 44a, 55a).

Blazak knew from the initial conversation that Miller was going to settle with Firemen's Fund for $5,000, and was going to look to SAFECO for the balance. (app. p. 41a-42a). Blazak said nothing at that time by way of protest. He simply indicated SAFECO'S unequivocal denial of coverage because there was a $5,000 Massachusetts insurance policy.

At the close of the evidence the defendant's counsel moved for a directed verdict on the grounds that the release issued to Firemen's Fund and Decesare voided the uninsured motorists coverage of SAFECO. After hearing counsel for defense in support of his motion for directed verdict, the Court heard counsel for the plaintiff in opposition to the motion for directed verdict, in part, late Friday afternoon, October 1st, then adjourned to Tuesday, October 5th. At that time plaintiff's counsel sought to complete his argument and present authorities, including the Connecticut law and other authorities set forth below. The Court refused to hear counsel, and thereupon read into the record the decision which it had already reached, directing a verdict in favor of the defendant on the grounds of the release. (app. p. 93a-102a).

SAFECO'S DENIAL OF COVERAGE WAS WRONG:

SAFECO was wrong in initially denying coverage. The existence of the $5,000 Massachusetts liability policy left them with an under-insured motorist. This brought into full play the uninsured motorists provisions of the SAFECO policy.

Fidelity and Casualty Co. of New York v. Darrow
161 Conn. 169
286 A.2d 288, 292-293 (1971)

SAFECO cannot escape liability by pointing to a policy issued to the negligent motorist, unless that policy is for the full $20,000.

Although SAFECO took this position initially, nevertheless after contact from the Insurance Commissioner they reversed their position, and admitted that there was coverage notwithstanding the other policy. Indeed, having advised the Insurance Commissioner that they would provide coverage, SAFECO is not in a position at this time to deny that there was initial coverage. SAFECO has neither pleaded as a special defense nor claimed in any of their briefs that the existence of the $5,000 liability Massachusetts policy negated uninsured motorists coverage here.

CONSEQUENCES FLOWING FROM BREACH:

Having wrongfully denied coverage, SAFECO may not now take advantage of their breach of the policy.

CONNECTICUT LAW APPLIES:

Under diversity rules, this policy having been issued in Connecticut by SAFECO to a Connecticut insured for vehicles of the insured which were garaged in Connecticut, Connecticut law applies, and the Trial Court was bound to follow Connecticut law.

CONNECTICUT LAW REVIEWED:

While the courts of Connecticut have not specifically ruled on the effect of a release of the uninsured motorist where the release follows a wrongful denial of coverage by the carrier, nevertheless the Connecticut cases make it clear that a carrier, having wrongfully denied coverage, may not invoke the protective provisions of the policy.

In Angela Mastergeorge v. Utica Mutual Insurance Company, et al, 6 Conn. Supp. 468, 476 (1935), the Superior Court (Honorable P.B. O'Sullivan, J.) decided that the requirement for immediate written notice of the accident was waived by the carrier's denial of liability on other grounds.

In Joseph Pavano v. Western National Ins. Co., 17 Conn. Supp. 493, 497, the Superior Court, Cotter, J. (presently Connecticut Supreme Court Justice) held that the carrier's denial of liability on other grounds amounts to an estoppel of its right to require a proof of loss.

Whether there was an estoppel is a question for the jury.

Id at 497

In the ancient case of Norwich and New York Transportation Co. v. Western Massachusetts Ins. Co., 34 Conn. 561, 570 (1868), the denial of all liability was held to be a waiver of the formal proofs of loss.

In Batchelor v. People's Fire Insurance Co., 40 Conn. 56, 64, the holding was similar.

How would the 20th century Connecticut Supreme Court treat this issue? The answer lies in Missionaries of Company of Mary, Inc. v. Aetna Casualty and Surety Co., 155 Conn. 104, 114, 230 A.2d 21, 26 (1967), a case where the carrier had wrongfully refused its obligation to defend the insured in a suit brought against the insured. The insured's personal counsel defended. A substantial judgment was rendered against the insured in that original suit.

In the suit over by the insured against the carrier, the carrier sought to defend (in part) on the claim that regardless of the obligation to defend the obligation for coverage depended on the specific coverage afforded in the policy, and sought to invoke certain coverage

exclusions in the policy.

Connecticut's Supreme Court refused to permit the insurance carrier to invoke the protective provisions of the policy because the carrier had breached its policy obligation to defend.

> "...reason dictates that the defendant should reimburse the plaintiff for the full amount of the obligation reasonably incurred by it...The defendant, after breaking the contract by its unqualified refusal to defend, should not thereafter be permitted to seek the protection of that contract in avoidance of its indemnity provisions. Nor should the defendant be permitted, by its breach of the contract, to cast upon the plaintiff the difficult burden of proving a causal relation between the defendant's breach of the duty to defend and the results which are claimed to have flowed from it." [Emphasis added]

Ibid

OUT OF STATE AUTHORITIES:

Although Missionaries of Company of Mary, Inc. v. Aetna Casualty & Surety Co., supra, does not involve a release given to an uninsured motorist, nevertheless the view taken by the Connecticut Supreme Court in Missionaries as to the consequences when an insurance company wrongfully denies coverage under the policy makes it clear that the Connecticut Supreme Court would apply Calhoun v. State Farm Mutual Automobile Insurance Co., 62 Cal. Rptr. 177, 178-181, 254 Cal.App.2d 407, 410-413 (1967).

The facts in Calhoun are as close to the facts in the case at bar as it is possible for any two cases to be. Calhoun, as here, involved an automobile policy with an uninsured motorists clause, where the insured was killed by the negligence of a driver who had an out-of-state liability policy limited to $5,000. The California uninsured motorists limits were $10,000. The insured contacted the carrier, advised the carrier that the responsible motorist only had $5,000 coverage and that the insured was looking to the carrier (State Farm) for the difference. The State Farm claim representative denied coverage on the grounds that the responsible motorist was not an "uninsured" motorist because he had $5,000 coverage. The insured made the claim representative aware that she was going to collect the $5,000 from the other party and would look to the defendant, State Farm, for the balance.

Several months later the plaintiff insured's attorney concluded settlement of the claim against the out-of-state motorist, obtaining the full $5,000 policy limits, and thereafter brought suit against the defendant carrier.

The California Court first held that an under-insured motorist is an uninsured motorist within the meaning of California law. The Court then commented that the insurer's denial of coverage was wrongful. This was wrongful even though the law in California did not become clear until after the release was signed.

62 Cal.Rptr. 178, 254 Cal.App.2d 409

The court in Calhoun rejected the insurer's defense that the settlement of the claim with the other motorist without the written consent of the insurer voided coverage. The court recognized the normal rule that a release or prosecution of suit to judgment without the written consent of the insurer voids coverage. However, where the carrier has denied coverage under the policy and the release and settlement follow the denial, the carrier may not plead the release as a defense.

The California Court applied case law which holds that:

> "...'the insurance company was in no position to invoke the provisions of the policy because when an insurance company denies all liability, an action of law is maintainable to recover the amount of damages which the insured would be entitled to recover if the company had performed its part of the contract'".

62 Cal.Rptr. 177, 180, 254 Cal.App.2d 407, 411-12

The Court affirmed the action of the trial court, describing it as follows:

> "In the instant case, the trial court held that the insurer 'erroneously and wrongfully' breached its contract of insurance when it denied any coverage whatsoever on the claim of its insured. This breach by the insurer occurred five months prior to any act or alleged breach by Mrs. Calhoun upon which the insurer could base any such denial of coverage."

The Court in Calhoun cited with approval Estrada v. Indemnity Insurance Company, 158 Cal.App.2d 129, 322 P.2d 294 (1958). Estrada had held:

> "An insurer may not thus repudiate a policy, deny all liability thereon, and at the same time be permitted to stand on the failure to comply with a provision inserted in the policy for its benefit."
>
> 158 Cal.App.2d 129, 138, 322 P.2d 300

Other courts have reached the same decision.

> Annot. 25 A.L.R.3d 1275, 1291
>
> 44 Am.Jur.2d, INSURANCE §1840

The New York Court of Appeals likewise in 1966 applied this rule to an insurance carrier, which, having denied liability, sought to disclaim on the grounds that the insured had obtained a judgment against the uninsured motorist without the insurance company's consent:

> "By repudiating liability, Vanguard breached its contract with the appellants under the Family Protection clause and thereby released the appellants from compliance with the clause requiring Vanguard's written consent to pursue their claim against Smith to judgment."
>
> Vanguard Insurance Company v. Polchlopek
> 275 N.Y.S.2d 515, 520, 222 N.E.2d 383, 387 (1966)

In Porter v. Empire Fire and Marine Insurance Company, the Arizona Court of Appeals considered a claim by the carrier that the in-

sured, by settling with the uninsured motorist following denial of coverage by the carrier, voided the policy coverage. The Court said:

> "When appellee denied coverage, it was precluded from subsequently invoking the policy provisions which were inserted for its benefit."

Porter v. Empire Fire and Marine Insurance Company
12 Ariz.App.2, 467 P.2d 77, 81 (1970)
(Appeal heard and decided on other grounds 106 Ariz. 274, 475 P.2d 258 (1970); 106 Ariz. 345, 476 P.2d 155)

In accord are Childs v. Allstate Insurance Company, 237 S.C. 455, 462-63, 117 S.E.2d 867, 871 (1961) and Powers v. Calvert Fire Insurance Company, 216 S.C. 309, 316-18, 57 S.E.2d 638, 642, 16 A.L.R. 2d 1261 (1950).

This Court is urged to compare these specific authorities from other jurisdictions with the reasoning and holding of the Connecticut Supreme Court in Missionaries of Company of Mary, Inc. v. Aetna Casualty & Surety Company, 155 Conn. 104, 114, 230 A.2d 21, 26, where the Court said:

> "The defendant, after breaking the contract by its unqualified refusal to defend, should not thereafter be permitted to seek the protection of that contract in avoidance of its indemnity provisions. Nor should the defendant be permitted, by its breach of the contract, to cast upon the plaintiff the difficult burden of proving a causal relation between the defendant's breach of the duty to defend and the results which are claimed to have flowed from it."

Missionaries of Company of Mary, Inc. v. Aetna Casualty & Surety Co.
Ibid

The philosophy expressed in Missionaries, as well as the specific rule enunciated above, confirms that, were it faced with the fact situation at bar, the Connecticut Supreme Court would readily adopt the rulings of the California, Arizona, New York and South Carolina courts holding that an insurance carrier, having denied coverage, may not escape liability because the insured settled with the uninsured motorist.

WAIVER AND ESTOPPEL:

SAFECO may not benefit from its own wrong. Its denial of coverage to Miller in February of 1975 was a wrongful breach of the policy. SAFECO may not thereafter seek to take advantage of the provisions of the policy. Rather it is liable for all damages which the insured would have recovered if the company had performed.

Missionaries of Company of Mary, Inc. v. Aetna Casualty & Surety Co.
155 Conn. 104, 114, 230 A.2d 21, 26 (1967)

CONCLUSION:

It was up to the jury to determine whether SAFECO denied coverage. If SAFECO did indeed deny uninsured motorists coverage to Attorney Miller in February or March of 1971, then, as a matter of law, SAFECO may not seek the benefit of the policy provisions. As a matter of law, the plaintiff is entitled to recover because SAFECO, having denied coverage, may not be permitted to take advantage of the pro-

tective clauses in the policy.

The trial court directed a verdict solely on the grounds of the settlement and release in favor of the uninsured motorist. The trial court, having an erroneous view of the law applicable to the insurance carrier's wrongful denial of coverage, committed error when it took the case away from the jury and committed error in entering judgment in favor of the defendant insurance carrier.

THE PLAINTIFF-APPELLANT

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GORDON

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 3 day of Jan., 1977 ~~1976~~ deponent served the within upon

Arnold J. Bai, esq.

attorney(s) for

appellee

in this action, at

10 Middle St., Bridgeport, Conn. 06604

the address(es) designated by said attorney(s) for that purpose by depositing _____ copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 3 day of JAN. , ~~1973~~ 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978